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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections	)	MM Docket 92-266
of the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	

COMMENTS OF GTE

Pursuant to Secction 1.429 of the Rules, GTE Service Corporation ("GTE"), on behalf of the GTE Domestic Telephone Operating Companies and GTE Laboratories Incorporated, hereby comments on the Petition for Reconsideration of the NYNEX Telephone Companies ("NYNEX") filed October 4, 1993 in the above-captioned proceeding.[1]

GTE earlier joined with NYNEX and Bell Atlantic in demonstrating that the cable systems of less than 30% penetration ("sub-30 systems") included in the Commission's survey of January-February 1993 could not be assumed to charge competitive prices, even though the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act") classifies such systems as subject to "effective competition." 47 U.S.C.§543(l). Instead, the survey revealed that the sub-30 systems' rates are "vastly higher" than those of private or municipal cable operations facing an established multichannel programming competitor and "higher even than those of monopoly systems."[2]

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[1] Notice of receipt of the NYNEX petition appeared at 58 Fed.Reg.59725-26, November 10, 1993.

[2] Joint Comments, June 17, 1993, 2.

Attached to the Joint Comments was the affidavit of economist Thomas Hazlett, which was summarized as concluding that "those high prices, coupled with unusually low consumer demand, are the causes of low penetration and that multichannel video competition is not a factor." *Id.* GTE maintains its endorsement of the Hazlett study, and supports NYNEX's request that the Commission reconsider the blanket inclusion of all surveyed sub-30 systems in the pool of operators whose rates became the foundation of the "benchmark" methodology adopted in the initial Report and Order in this docket.[3]

Despite the contention of Joint Commenters and others that the statutory classification of sub-30 systems as subject to effective competition did not demand the wholesale incorporation of their prices into the ratesetting methodology, the Commission was not persuaded. Instead, it essentially agreed with cable industry views that the law would not permit removing sub-30 systems from the competitive-price pool.[4] The agency also found factual support for their removal speculative, and surmised that low penetration rates testified to lack of monopoly power. Finally, the FCC appeared hesitant to order cable rate reductions nearly tripling what its methodology called for with the sub-30 systems included in the competitive pool. It chose "a more cautious approach." FCC 93-428 at ¶¶129-30.

<u>The law does not compel the blanket assumption that rates of all sub-30 systems are competitive.</u>

The 1992 Act gives the Commission discretion in developing cable rates guidelines. Congress plainly expected the agency to exercise informed judgment. Lists of seven ratesetting factors for basic service and six for cable programming

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[3] *Rate Regulation,* 8 FCC Rcd 5631 (1993), Appendix E, ¶¶25-34.

[4] *Second Report & Order,* FCC 93-428, released August 27, 1993, ¶128.

service are preceded, respectively, by the phrases "shall take into account" and "shall consider."[5] As shown by NYNEX (Petition, 2-3), the FCC acknowledged this statutory discretion at the time of the Further Notice. Thus it is difficult to understand the conclusion of the Second Report and Order that the law gives the agency no choice but to include sub-30 systems in the competitive pool for ratesetting purposes.

In GTE's view, Congress did not intend for the Commission to choose between extremes on this issue. At one extreme, it did not anticipate the blanket inclusion of all sub-30 systems if their rates demonstrably were unrelated to competitive forces. For if this had been the legislative purpose, the ratesetting language in Section 623 would not have allowed for the consideration of so many other partly subjective factors. At the other extreme, Congress did not expect the wholesale and unexamined removal of sub-30 systems from the competitive pool. If the legislators had considered these systems to be possess undue market power, they would not have exempted the systems from rate regulation in the first place.

Accordingly, the Commission's mediating task should be to examine individually the sub-30 systems initially surveyed, and to add to the inquiry any others that have come to light since. The FCC should consider and take account of competitive, economic and social factors that contribute to understanding the systems' penetration levels and rates. Applying its informed judgment, the agency should decide which rates to group with those of systems facing direct multichannel competition, for purposes of benchmark formulation, and which to exclude from this pool of competitive prices.

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[5] 47 U.S.C.§§543(b)(2)(C) and (c)(2), respectively. In the latter case of cable programming service, discretion is increased by the permissive phrase "among other factors."

The record consists of more than speculation, and the information submitted is suggestive for the FCC's own study.

This is the kind of careful examination placed on the record by Professor Hazlett in his Affidavit attached to the Joint Comments. Prof. Hazlett took into account quantitative data on populations and incomes, as well as anecdotal information. If the Commission remains unpersuaded, this is all the more reason to conduct its own study. It does not meet Congressional expectations of "consideration," however, for the agency simply to conclude without explanation that the efforts of the Joint Commenters and others add up to nothing more than speculation.

While high system costs as a contributor to high rates of sub-30 systems may have been beyond the scope of the initial price and revenue orientation of the survey, costs are expressly included among the ratesetting factors in Section 623. And although poor management may be too subjective to examine usefully, the fact of "new construction which has not yet been fully marketed" would seem to be capable of objective determination. FCC 93-428 at note 232.

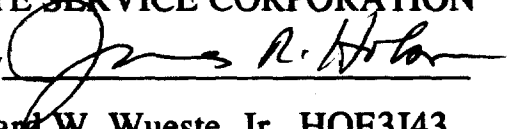
Moreover, the Hazlett hypothesis (Affidavit, 9) of elderly populations who are satisfied with over-air television, even if based on anecdote, implicates a rival force to cable (conventional broadcasting) which Congress must have had in mind when it created the sub-30 classification of systems deemed subject to effective competition.

Based on the foregoing, the Commission would be well advised to conduct its own consideration of the relatively small number of sub-30 systems. This would meet the commands of Section 623 and would avoid the extremes of (1) taking refuge in the statutory definition of effective competition, which is a rate exemption classification, not a ratesetting element; and (2) declaring all sub-30

systems non-competitive for ratesetting purposes simply because they face no multichannel competition.

Respectfully submitted,

GTE SERVICE CORPORATION

By 

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November 24, 1993

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Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Petition for Reconsideration of GTE" have been mailed by first class United States mail, postage prepaid, on the 25th day of November, 1993 to the following parties:

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